Supreme Court, U.S.
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No. 95-1743

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SYLVIA HILL, RAYMOND GRIFFIN,
and EUGENE ROSS,

Petitioners,

v.

WAYLAND CLIFTON, JR.,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether a public official asserting qualified immunity has a right to immediately appeal a district court's order denying summary judgment where the appeal involves the application of clearly established law to a given set of undisputed facts and does not implicate the existence or non-existence of a triable issue of fact.

PARTIES TO THE PROCEEDINGS

Petitioners, Sylvia Hill ("Hill") and Raymond Griffin ("Griffin"), are residents of Gainesville, Alachua County, Florida. Petitioner, Eugene Ross ("Ross"), is a resident of Ocala, Marion County, Florida.

Respondent, Wayland Clifton, Jr. ("Clifton"), is a resident of Gainesville, Alachua County, Florida.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Wayland Clifton, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Sylvia Hill, Raymond Griffin and Eugene Ross.

OPINIONS BELOW

On January 26, 1996, the United States Court of Appeals for the Eleventh Circuit reversed the Orders of the United States District Court for the Northern District of Florida denying Wayland Clifton, Jr. qualified immunity and remanded the cause with instructions to enter summary judgment in favor of Clifton on his qualified immunity defense. The Court's opinion is reported at 74 F.3d 1087 (11th Cir. 1996) and is reproduced in the Appendix to Petitioners' Petition for Certiorari. (Pet.App. 1a-12a).

The Orders of the United States District Court for the Northern District of Florida denying in part Wayland Clifton, Jr.'s Motions for Summary Judgment are unpublished; however, the Orders are reproduced in the Appendix to Petitioners' Petition for Certiorari. (Pet.App. 13a-46a).

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the United States Court of Appeals for the Eleventh Circuit was invoked as an exception to 28 U.S.C.§1291 based on Mitchell v. Forsyth, 472 U.S. 511, 527-29 (1985) and Courson v. McMillian, 939 F.2d 1479, 1486 (11th Cir. 1991) as an appeal of an order denying Wayland Clifton, Jr. summary judgment based on qualified immunity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., amend. I:

> Congress shall make no law ... abridging the freedom of speech....

U.S. CONST., amend. XIV, §1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. §1291:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ....

42 U.S.C. §1983:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I.

Factual Background [1] and [2]

Hill, Griffin and Ross were police officers employed by the City of Gainesville, Florida police department and served together in the Internal Affairs section ("IA"). (Pet.App. 3a).

In the fall of 1990, Clifton began to notice that the work product in IA was deteriorating and he counseled Hill, Griffin and Ross about his concerns. (Pet.App. 8a and 23a; RH6-294, Clifton Dep. Vol. II at 94-7, Vol. IV at 196-7, Tab 2).

In February 1991, Hill found out that Clifton intended to transfer her out of IA because her poor job

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[1] Only those facts which are undisputed for appellate purposes are recited.

[2] Clifton's motions for summary judgment were filed in the district court together with a statement of material facts and a two-volume appendix containing record excerpts. These papers are combined in the record on appeal No. 94-3184 as R6-294, No. 94-3179 as R2-165 and No. 94-3180 as R2-161. References to the appendix will appear in Clifton's brief as "RH6-294, ____ Dep. Vol. ___ at page ___, Tab ___; RG2-165, ___ Dep. Vol. ___ at page ___, Tab ___' or RR 2-161, ___ Dep. Vol. ___ at page ___, Tab ___".

performance and animosity toward him had caused him to lose confidence in her loyalty and confidentiality. (Pet.App. 4a and 8a; RH-294, Clifton Dep. Vol. II at 118-20, Tab 2; Hill Dep. Vol. I at 7, Vol. VI at 973-4, Tab 5).

Immediately after learning that Clifton intended to replace her in IA, Hill, with Ross' approval, assigned Griffin to investigate allegations of misconduct (manipulating promotions) by a group of police officers calling themselves "Hallucinations 2000" and to see if Clifton might be involved. (Pet.App. 3a; RH6-294, Ross Dep. Vol. II at 186-91, Tab 10; Vol. III at 226-31, Tab 10).

After Hill had been officially transferred out of IA (early April 1991), Clifton, in consultation with the city manager, responded to reports of mismanagement in IA by ordering an investigative performance audit of the unit. (Pet.App. 8a; RH6-294, Clifton Dep. Vol. II at 101-3, Tab 2; White Dep. Vol. I at 11-36, Tab 15). Hill, Griffin and Ross knew that they were under investigation and all three were denied access to IA. (Pet.App. 4a and 8a; RH6-294, Clifton Dep. Vol. II at 101-3, Tab 2; White Dep. Vol. I at 11-36, Tab 15).

The internal investigative audit of IA was finalized on June 3, 1991 and uncovered gross mismanagement of that unit during the time frame that Hill, Ross and Griffin were running it. (Pet.App. 4a and 5a; RH6-294, Scott Dep. Vol. I at 44-6, Tab II; Terry Dep. Vol. I at 52, Vol. II at 6-7, 43, 46, 52, 69-70, Tab 12; Exhibit 217, Tab 24).

In July 1991, Clifton offered to transfer Hill, Griffin and Ross to any position within the police department, except IA, with no loss of pay, rank or benefits. (Pet.App. 3a, 4a and 9a, n.2; RH6-312, Turner Dep. Vol. I at 117,

Tab 13). However, knowing that they were under investigation and that their own job security depended on discrediting Clifton, Hill, Griffin and Ross rejected this proposal and went to the grand jury anyway with their accusations about "Hallucinations 2000". (Pet.App. 4a, 9a, n.2, 11a; RH6-312, Turner Dep. Vol. I at 117-18, 120, Tab 13).

After Hill, Griffin and Ross went to the grand jury, the audit findings were reviewed and employee misconduct charges were filed against them in August 1991. (Pet.App. 4a; RH6-294, Clifton Dep. vol. IV at 6-9, Tab 2; Scott Dep. Vol. II at 9-10, Tab 11).

II.

Procedural Background.

Hill, Griffin and Ross each brought separate lawsuits against the City of Gainesville ("City") and Clifton alleging that they had been disciplined in retaliation for communicating with the grand jury. The District Court granted summary judgment to the City on all charges. It also entered summary judgment for Clifton under qualified immunity on all causes of action except the Petitioners' First Amendment retaliation claims based on their contact with the grand jury. Clifton immediately appealed the denial of qualified immunity on the grounds that the undisputed given facts of the case did not show a violation of clearly established law.[3]

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[3] Clifton's summary judgment motion was not premised on the lack of evidence establishing that protected speech motivated him to take disciplinary action against the Petitioners. Likewise, Clifton did not argue that he was entitled to qualified immunity because of evidence

The United States Court of Appeals for the Eleventh Circuit accepted jurisdiction of Clifton's appeal on the basis that the appealable issue was a purely legal one, i.e., whether the undisputed facts of the case supported a claim that Clifton violated clearly established law. The Petitioners now challenge the authority of the Court of Appeals to immediately review the District Court's denial of qualified immunity to Clifton.

SUMMARY OF ARGUMENT

This Court should refuse to grant review of the petition for the following reasons:

1) The District Court's Order denying Clifton's motion for summary judgment is immediately appealable because a) Clifton is a public official asserting qualified immunity, and b) the issue appealed involves whether or not certain given undisputed facts show a violation of "clearly established" law.

2) The dispute underlying the Clifton appeal concerns the application of clearly established law to a given set of undisputed facts. It does not implicate the existence or non-existence of a triable issue of fact, i.e., facts the litigants might or might not be able to prove after trial, but, rather whether Clifton, in light

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showing he would have made the same decision in the absence of protected speech. However, the District Court erroneously injected those factual issues into its qualified immunity analysis.

On appeal Clifton preserved his objections to that part of the District Court's orders, but pointed out that he could not immediately appeal the denial of qualified immunity on that basis.

of the undisputed facts known to him at the time, violated clearly established law when he disciplined the Petitioners.

3) Clifton's right to immediately appeal the denial of his qualified immunity defense is not barred because the District Court's Order was based on a finding that there are issues of fact for trial on the merits of the Petitioners' constitutional tort claim. The factual uncertainties cited by the District Court are only relevant to the merits of the Petitioners' underlying retaliation claim and have no bearing or effect on Clifton's right to qualified immunity.

4) The Court of Appeals followed the jurisdictional guidelines set by this Court in Johnson v. Jones, 115 S.Ct. 2151 (1995), for immediate review of a trial court's denial of qualified immunity.

Accordingly, the Petition for Writ of Certiorari filed by the Petitioners should be denied.

ARGUMENT FOR DENYING THE WRIT

Qualified immunity protects government officials performing discretionary functions from civil trials and liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In other words, an official carrying out discretionary duties is entitled to qualified immunity if either 1) the law was not clearly established or 2) the official reasonably could have believed his (her) actions were consistent with established law. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The Petitioners do not challenge whether Clifton is entitled to qualified immunity, but, rather, whether he is entitled to immediate appellate review of the District Court's Order denying his motion for summary judgment based on that defense. The heart of the Petitioners' argument is that this Court's decision in Johnson v. Jones, supra, bars immediate appellate review because the trial court found genuine issues of material fact on the merits of their underlying constitutional tort claim. Hill, Griffin and Ross contend that Johnson precludes an appellate court from reviewing whether a public official violated clearly established law under any given set of facts, even those which are not in dispute or have no bearing or effect on the official's right to qualified immunity. However, the Petitioners are wrong - the jurisdictional guidelines established in Johnson clearly authorize an appellate court to review a given set of undisputed facts and to decide whether under those facts the official violated clearly established law. Johnson, 115 S.Ct. at 2158-2159. And, this is precisely what the Eleventh Circuit Court of Appeals did when it accepted jurisdiction of Clifton's interlocutory appeal and reversed the District Court with instructions to enter summary judgment in favor of Clifton on his qualified immunity defense. Behrens v. Pelletier, 116 S.Ct. 834 (1996).

I.

A district court's order denying a defendant's motion for summary judgment is immediately appealable as a "collateral order" (i.e., a final decision) where (1) the defendant is a public official asserting a defense of "qualified immunity," and (2) the issue appealed concerns, not which facts the parties might be able to prove, but, rather, whether or not certain given facts show a violation of "clearly

established" law. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Johnson, 115 S.Ct. at 2155.

The "relevant question" for qualified immunity purposes in First Amendment retaliation cases is not whether the right of government employees to be free from retaliatory discipline for protective speech is clearly established, but, rather, whether a reasonable public official could have believed that the discipline was lawful in light of clearly established law and the information the moving party possessed at the time he (she) acted. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Thus, the qualified immunity standard not only requires courts of appeals to examine what law is clearly established, it also mandates that they examine the information possessed by government officials accused of violating that law. Anderson, 483 U.S. at 641. In essence, then, the legal question of qualified immunity is itself fact-intensive where the party asserting that defense asks the court of appeals to examine a given set of undisputed facts that were known to him (her) in order to determine whether he (she) violated clearly established law by his (her) actions. And, Johnson unequivocally allows immediate appellate review in such instances even though they involve a fact-intensive inquiry. Johnson, 115 S.Ct. at 2159.

II.

Johnson does not preclude Clifton's appeal. Johnson holds that a defendant, entitled to invoke a qualified immunity defense, may not immediately appeal a district court's order denying that defense where the defendant's immunity from suit depends on a resolution of conflicting factual assertions, or even on determining whether there is a contestable factual question material to the defense of

immunity. Johnson, 115 S.Ct. at 2159. Johnson does not, however, preclude an appellate court from reviewing whether a public official violated clearly established law under a given set of facts which are not disputed. On the contrary, Johnson permits immediate review of the rejection of a qualified immunity defense when the issue appealed does not focus on what facts the litigants might (or might not) be able to prove after trial, but, instead involves whether a given set of facts shows a violation of clearly established law. Id. at 2158-2159.

In Johnson, the defendant did not appeal the issue of whether his conduct under a given set of undisputed facts violated clearly established law, but merely argued that the trial court's denial of qualified immunity was erroneous because there was no record evidence proving he had engaged in any conduct which supported the plaintiff's allegations of a constitutional violation. Id. at 2154. Clifton, on the other hand, asked the Court of Appeals to 1) examine a given set of facts known to him which Hill, Griffin and Ross did not dispute and 2) to decide whether under those facts he violated clearly established law. And, under the precedent of Harlow, Mitchell, Anderson and Johnson, the Court of Appeals was required to accept jurisdiction and address those arguments. Behrens, 116 S.Ct. at 841.

III.

The Petitioners contend that the Court of Appeals did not have jurisdiction to hear Clifton's interlocutory appeal because the District Court's Order denying qualified immunity was based on a finding that there were issues of fact for trial on the merits of their constitutional tort claim. They argue that the reasons given by the District Court in its

order for denying Clifton qualified immunity automatically and conclusively foreclose any interlocutory appeal. According to the Petitioners, the mere wording or phrasing of the District Court's Order divests an appellate court of jurisdiction to review whether a public official violated clearly established law under any set of facts. However, under close scrutiny, the Petitioners' rationale is bogus and does not accurately reflect what this Court said in Johnson.

In Behrens, the respondent, relying on Johnson, asserted that appeal of denial of a summary judgment based on qualified immunity was not available because the denial rested on the ground that "[m]aterial issues of fact remain". However, in response this Court observed:

> That is a misreading of the case. Every denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and Johnson surely does not mean that every denial of summary judgment is nonappealable. Johnson held, simply that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under Cohen and Mitchell. Johnson reaffirmed that summary-judgment determinations are appealable when they

> resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity -- typically the issue whether the federal right allegedly infringed was "clearly established."

Behrens, 116 S.Ct. at 841 (citations omitted).

> Johnson permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the Harlow standard of "objective legal reasonableness." And while the District Court, in denying petitioner's summary-judgment motion, did not identify the particular charged conduct that it deemed adequately supported, Johnson recognizes that under such circumstances "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."

Behrens, 116 S.Ct. at 842 (citations omitted).

Johnson tells us that a defendant's right to immediately appeal the denial of qualified immunity is not controlled by the wording or phrasing of the district court's order. If it were otherwise, a defendant would have no immediate recourse to avoid trial and liability, notwithstanding that the district court mistakenly identified clearly established law, incorrectly applied clearly established law to the facts it found and/or assumed facts which, even when viewed in the light most favorable to the plaintiff, were not

supported by the record. In short, qualified immunity would be a nullity. Johnson, 115 S.Ct. at 2159.

Whenever, as in this case, a district court's decision denying qualified immunity is challenged on the grounds that the court mistakenly identified clearly established law, the appeals court has to know what set of facts to assume before it answers the purely legal question ("clearly established" law) underlying the qualified immunity defense. If the district court properly identifies those facts in its order, the court of appeals can simply adopt them. However, where the district court denies summary judgment without stating its reasons or alludes to factual uncertainties which are relevant only to a party's underlying tort claim and have no bearing or effect on a defendant's right to qualified immunity, the appellate court is entitled to review the record to determine for itself what facts the trial court likely relied on. In either case, an appeals court may conduct its own evidence based examination of the record in order to determine whether under a given set of undisputed facts the defendant violated clearly established law. Id. at 2159; see also Anderson, 483 U.S. at 641; Behrens, 116 S.Ct. at 842.

In this case, Clifton attacked the District Court's Order denying him qualified immunity because the Court mistakenly identified clearly established law, i.e., the Court's analysis of his qualified immunity defense was fatally flawed because the Court 1) incorrectly applied the clearly established law to the facts it found, 2) assumed other facts which were not supported by the record even when viewed in the light most favorable to the Petitioners, 3) failed to address the core issue of the defense, i.e., whether Clifton reasonably could discipline the Petitioners based on the facts as he knew them to be and 4) failed to state the

facts it assumed when it denied summary judgment based on pre-existing "clearly established" law.

IV.

Here the District Court failed to determine or even address the core legal issue of Clifton's qualified immunity defense, i.e., could a reasonable public official have believed Clifton's conduct was lawful based on "clearly established" law? The Court did (albeit erroneously) analyze the preliminary issue of whether the Petitioners' claim even involved or implicated a federally protected right, i.e., whether the Petitioners' speech invoked the protection of the First Amendment. Rankin v. McPherson, 483 U.S. 378, 384 (1987); Siegert v. Gilley, 500 U.S. 226 (1991); Waters v. Churchill, 114 S.Ct. 1878, 1884 (1994). But, then the Court stopped and never applied the objective-reasonableness test to the undisputed facts of the case to determine whether Clifton, based on what he knew, reasonably could have believed that disciplining the Petitioners did not violate clearly established law. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). Moreover, the District Court did not identify any facts which supposedly violated "clearly established" law. (Pet.App. 13a-37a).

Instead, the Court went off on a tangent and denied Clifton qualified immunity because of disputed facts relating to whether the Petitioners' protected speech was a substantial motivating factor behind Clifton's decision to discipline them and whether Clifton would have reached the same decision in the absence of that speech. Neither of these issues is relevant to or has any bearing or effect on Clifton's right to

qualified immunity[4] - they are merely two elements of the four-part test adopted by the Eleventh Circuit to determine whether a public employee has been retaliated against because of his (her) speech. Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989). Furthermore, the Court failed to even list the facts relating to those issues which it had assumed and relied on.

V.

Following the guidelines of Johnson,[5] the Court of Appeals accepted jurisdiction of Clifton's appeal and conducted its own review of the record to determine what facts the District Court, in the light most favorable to the Petitioners, should have assumed had it addressed the issue of whether Clifton reasonably could have believed that he could discipline the Petitioners based on the facts as he knew

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[4] The subjective intent of the government actor is not material to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 815-18 (1982).

[5] The Eleventh Circuit has consistently adhered to the jurisdictional guidelines announced by this Court in Johnson v. Jones. See Prosser v. Ross, 70 F.3d 1005 (11th Cir. 1995); Heggs v. Grant, 73 F.3d 317 (11th Cir. 1996) (appeals court may review whether clearly established law was violated under given set of facts); Suissa v. Fulton County, Georgia, 74 F.3d 266 (11th Cir. 1996); Haney v. Cumming, 69 F.3d 1098 (11th Cir. 1995); Ratliff v. DeKalb, Georgia, 62 F.3d 338 (11th Cir. 1995) (whether facts showed that defendants discriminated against the plaintiff not subject to interlocutory appeal); Mastroianni v. Bowers, 74 F.3d 236 (11th Cir. 1996) (disputed issue regarding conduct alleged to have violated clearly established law; court has no interlocutory jurisdiction to review).

them to be.[6] After determining what those undisputed facts were, the Court of Appeals analyzed pre-existing "clearly established" law and concluded that there were no cases which might have told Clifton 1) that the Petitioners' grand jury testimony was a matter of public concern rather than personal gain or 2) that he could not take disciplinary action against the Petitioners based on an investigation initiated before he even knew about the Petitioners' alleged protected speech to the grand jury. Accordingly, the Court correctly held that Clifton's conduct did not violate "clearly established" law and that he is entitled to the protection afforded by qualified immunity.

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[6] Contrary to the representation made by the Petitioners at page 15 of their petition, the Eleventh Circuit's decision in this case is not in conflict "with virtually every court of appeals' interpretation of Johnson v. Jones". See Stella v. Kelley, 63 F.3d 71 (1st Cir.1995); Blue v. Koren, 72 F.3d 1075 (2d Cir. 1995); Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995); Jackson v. City of Atlanta, Texas, 73 F.3d 60 (5th Cir. 1996); Christophel v. Kukulinsky, 61 F.3d 479 (6th Cir. 1995); Sanderfer v. Nichols, 62 F.3d 151 (6th Cir. 1995); Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995); Reece v. Groose, 60 F.3d 487 (8th Cir. 1995).

CONCLUSION

Respondent respectfully submits that the Court of Appeals had jurisdiction to accept an immediate appeal of the District Court's Orders denying his motions for summary judgment based on qualified immunity. The Petition for Writ of Certiorari filed by the Petitioners should, therefore, be denied.

Respectfully submitted,

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